

REMARKS

I. Status of the Claims

Claims 1-18 are pending in the application. In response to the restriction requirement, applicant elected, with traverse, to prosecute claim 18, the Group II claim. Thus, claims 1-17 are withdrawn, and claim 18 is under consideration and stands rejected under 35 U.S.C. §103. The specific grounds for rejection, and applicant's response thereto, are set out in detail below.

Claim 18 has been amended above. Support for the amendment can be found, for example, at pages 4-5 of the specification as filed. No new matter is added.

II. Rejection under 35 U.S.C. §103

Claim 18 is rejected by the examiner under 35 U.S.C. 103(a) as being unpatentable over Moldowan *et al.* (U.S. Patent 4,496,548), Langeland (U.S. Patent Publication 2005/0019427), Livingston (U.S. Patent 5,475,031), Horrobin (GB 2118437) and Mansouri *et al.*. Once again, applicants traverse.

The subject matter of claim 18 involves a *method* of affecting the alcohol metabolism by administering to a subject the recited food composition or dietary supplementation (*i.e.*, one containing dextrose, Vitamin C, L-glutamine, cysteine, riboflavin, succinic acid and/or fumaric acid and coenzyme Q10), and wherein the method reduces ethanol and acetaldehyde in blood. In addition, the claim has now been amended to recite specific ranges for the amounts of each component.

The examiner has cited each of the foregoing references as providing one or more of the above-recited components: Moldowan for cysteine and vitamin C, Langeland for dextrose, vitamin C, cysteine and riboflavin, Livingston for succinic acid, Horrobin for succinic acid and

glutamine, and Mansouri for coenzyme Q10. Because each of these reference is said to relate in some way to ameliorating the effects of alcohol in a subject, the examiner finds their combination proper and sufficient to render claim 18 *prima facie* obvious.

In accordance with controlling case law, citation of a reference requires that the reference be relied on *as a whole*. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 218 USPQ 871 (Fed. Cir. 1983); *Schenck v. Nortron Corp.*, 713 F.2d 782, 218 USPQ 698 (Fed. Cir. 1983). Moreover, it is improper to “pick and choose” from the art only that which supports the rejection. *In re Geiger*, 815 F.2d 686 (Fed. Cir. 1987) (“Based upon the prior art and the fact that each of the three components of the composition used in the claimed method is conventionally employed in the art for treating cooling water systems, the board held that it would have been *prima facie* obvious, within the meaning of 35 U.S.C. 103, to employ these components in combination for their known functions and to optimize the amount of each additive...Appellant argues...hindsight reconstruction or at best, ...’obvious to try’.... *We agree with appellant*”) (emphasis added).

Here, turning to the cited art, Moldowan discloses a composition comprising thiamine, ascorbic acid, either cysteine or cysteic acid, and at least one flavonoid complex – in other words, at least four components. Next, Langeland discloses a highly complex dosing including caffeine, herbs and fructose, with the relevant citation made by the examiner (col. 5, Table 1) to the herb) to the herb Yerba mate:

TABLE 1

<u>Composition of Yerba Matè</u>			
	Minimum amount	Maximum amount	Average amount
Moisture	5.36	9.80	8.17
Proteins	8.30	13.45	10.89
Carbohydrates	9.70	14.18	12.04
Starch	2.56	6.63	4.55
Glucose	1.30	6.14	3.84
Fibers	14.96	19.95	16.96
Ashes	6.310	7.780	6.910
Chlorine (g)	0.082	0.160	0.116
Sulphur	0.082	0.168	0.125
Phosphorus (g)	0.074	0.214	0.120
Calcium	0.597	0.824	0.668
Magnesium (g)	0.134	0.484	0.337
Potassium (g)	1.181	1.554	1.350
Sodium (g)	0.000	0.003	0.002
Iron (mgs) %	--	94.000	59.900
Cuprum (mgs)	0.600	1.600	1.260
Manganese (mgs)	30.200	183.000	133.180
Caroffin (mgs)	0.639	2.267	1.234
Caroffin (vitamin A U.I.)	1.065	3.779	2.095
Thiamin (gamma)	62.300	313.100	222.700
Riboflavin	246.000	573.900	404.300
Ascorbic acid	8.200	20.700	11.900

Col. 5. Thus, this reference, when applied as suggested by the examiner, requires at least 24 distinct elements. Horrobin discloses fatty (succinic) acids and glutamine, Livingston discloses a composition with glucose, sucrose, fructose, sodium chloride, potassium chloride, potassium sorbate, citric acid and ascorbic acid. Mansouri *et al.* discloses the anti-oxidant benefits of co-enzyme Q10, but indicates that for protection from ethanol-induced mitochondrial DNA damage one also needs to administer 4-methylpyrazole. Importantly, Mansouri *et al.* lists co-enzyme Q10 as an *optional* additional agent selected from one of three different anti-oxidants, also including

vitamin E and melatonin. Thus, the references not only disclose those elements to which the examiner cites, but a very large number of other agents. In order to rely on these references, the skilled artisan would use the *entire* dosage forms from each reference as described above, and not conduct a picking a choosing from each.

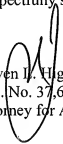
Turning the amended claims, they now require a specific amount range for each of the recited components. It is submitted that if the cited references are indeed each relied upon “as a whole,” then it would be virtually impossible to arrive at the specified amounts of each claimed component given the sheer number of other compounds that would have to be included. Moreover, where the prior relies on a element of the claimed invention as an “optional” feature (such as Yerba Matè and coenzyme Q10), applicants again submit that the examiner is engaging in an improper hindsight analysis of the art, “picking and choosing” only those elements of the claims from the hundreds (if not thousands) of possible agents. Reconsideration and withdrawal of the rejection is therefore respectfully requested.

Once again, applicants submit that the methods of the present invention are not obvious in view of the cited art for at least the reasons that the references, when combined, would not lead one to the specific set of compounds and amounts as claimed. To find otherwise is to fall victim to an improper hindsight analysis, where the present claims are used as a road map to select from among a myriad of different combinations by “picking and choosing.” Reconsideration and withdrawal of the rejection is therefore respectfully requested.

III. Conclusion

In light of the foregoing, applicant respectfully submits that all claims are in condition for allowance, and an early notification to that effect is earnestly solicited. The examiner is invited to contact the undersigned attorney at (512) 536-3184 with any questions, comments or suggestions relating to the referenced patent application.

Respectfully submitted,


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